Ramani Raxen a/l Subramaniam v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05(M)-157–04 OF 2017 AND B-05(M)-159–04 OF 2017
MOHTARUDIN BAKI, RHODZARIAH BUJANG AND MOHAMAD ZABIDIN JJCA
27 MARCH 2019

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged with offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 — Appellant convicted and sentenced to death — Whether there was reasonable doubt against prosecution's case — Whether issue of discrepancy in evidence of witnesses material — Whether there were doubts on identity of drug exhibits — Whether there was suppression of evidence — Dangerous Drugs Act 1952 s 39B(1)(a)

Each of the appellants (Ramani and Devendran) who were brothers in these two appeals, which were heard together, were jointly charged in the Shah Alam High Court with trafficking in 339.3g of heroin and 140.4g of monoacetylmorphines with two others still at large. A registered informer informed to a police inspector ('PW4') that Ramani was trafficking heroin in Kajang area and PW4 was introduced by the informer to Ramani as an interested buyer of the drug. PW4 and Ramani then arranged to meet. On 28 May 2013, PW4 went to the meeting with a fellow policeman ('PW5') who masqueraded as his worker. At that meeting, where Ramani came alone, discussion was held on the price of heroin. For the second meeting on 13 June 2013, PW4 was also accompanied by PW5. The police also had a back-up team headed by PW2. Further discussion was held on the amount of drugs to be supplied and a date was fixed for the delivery of heroin. On 20 June 2013 Ramani arrived with Devendran at the designated meeting point. Devendran informed PW4 that his friend would come with the heroin soon. About five minutes after that call, a white Viva car came and stopped in front of the PW4 and PW5's Vios car. According to PW4, Devendran then brought him to the back passenger seat, opened its door where he saw another two Indian men in the driver's and front passenger's seat. Devendran took a bag from behind the driver's seat and showed him the packets of heroin. At that point, PW4 gave the pre-arranged signal to his other team members by taking off his spectacle and took the bag handed to him by Devendran. However, as the raiding team approached the Viva car, it managed to dash off whilst the two brothers were apprehended by the police. The drug seized were subsequently sent to the chemist who confirmed the type of drug and of the weight as stated in the

charge. They were convicted and sentenced to death by the learned judicial commissioner. Hence, this appeal.

Held, dismissing the appeal and affirming the decision of the judicial commissioner:

(1) The respective roles played by Ramani and Devendran, were clear evidence of a common intention as laid out in the charge which their defence of bare denial had failed to create a reasonable doubt. Furthermore, the learned judicial commissioner was fully entitled, to give little weight to the statement from the dock of Devendran for it was accepted in law that such a statement, being not given under oath and not subjected to cross-examination carried very little weight. The issue of the discrepancy in the evidence of PW4 with that in the police report made by PW2 in respect of the actual time when the signal to ambush was made was not material at all (see para 9).

(2) PW2 had explained what he did with the exhibits after the seizure as did the investigation officer. Furthermore, when PW2 gave evidence he was not asked to explain whether the weighing scale used by him was calibrated. Without confronting the said witness with such factual issue it was simply too late to make that an issue in this appeal (see para 10).

(3) The court were unable to agree with the contention that there was suppression of the evidence which was the forensics report by the examiner of the three handphones seized from the two brothers. The evidence of the calls from the said handphones were not material and did not create any gap in the prosecution's case in the given facts of this case which was built on the negotiations prior to the sale and the actual delivery made at the appointed time and place. The evidence of the telephone calls, if any, was merely corroborative and the defence never did challenge the non-production of it when the investigation officer gave evidence. There was therefore no suppression of evidence as alleged (see paras 11–12).

(4) It was never disputed by the defence during the prosecution case that the car was not a Viva car as described by PW2, PW4 and PW5. The evidence pertaining to the said car from the said witnesses in view of the non-challenge must be taken to have been accepted by the defence based on their own failure to cross-examine the relevant witnesses on its description (see para 13).

[Bahasa Malaysia summary

Setiap perayu (Ramani dan Devendran) yang bersaudara dalam kedua-dua rayuan, yang didengar bersama, didakwa secara bersama di Mahkamah Tinggi Shah Alam kerana mengedar 339.3g heroin dan 140.4g monoacetylmorphin dengan dua orang lagi yang masih bebas. Seorang pemberi maklumat berdaftar

memaklumkan kepada seorang inspektor polis ('PW4') bahawa Ramani mengedar heroin di kawasan Kajang dan PW4 diperkenalkan oleh pemberi maklumat kepada Ramani sebagai pembeli yang berminat untuk dadah tersebut. PW4 dan Ramani kemudian mengatur untuk bertemu. Pada 28 Mei 2013, PW4 pergi ke pertemuan tersebut dengan seorang anggota polis ('PW5') yang menyamar sebagai pekerjanya. Pada pertemuan tersebut, di mana Ramani datang sendiri, perbincangan diadakan berkenaan harga heroin. Untuk pertemuan kedua pada 13 Jun 2013, PW4 turut diiringi oleh PW5. Polis juga mempunyai pasukan sokongan yang diketuai oleh PW2. Perbincangan lanjut diadakan mengenai jumlah dadah yang akan dibekalkan dan tarikh ditetapkan untuk penghantaran heroin. Pada 20 Jun 2013, Ramani tiba bersama Devendran di tempat pertemuan yang ditetapkan. Devendran memberitahu PW4 bahawa kawannya akan datang dengan heroin nanti. Kira-kira lima minit selepas panggilan tersebut, sebuah kereta Viva putih datang dan berhenti di hadapan kereta Vios PW4 dan PW5. Menurut PW4, Devendran kemudian membawanya ke kerusi penumpang belakang, membuka pintu di mana dia melihat dua lagi lelaki India di kerusi pemandu dan penumpang depan. Devendran mengambil beg dari belakang kerusi pemandu dan menunjukkan kepadanya paket heroin. Pada ketika itu, PW4 memberi isyarat yang telah diatur terlebih dahulu kepada ahli pasukannya yang lain dengan membuka cermin matanya dan mengambil beg yang diserahkan kepadanya oleh Devendran. Bagaimanapun, ketika pasukan penyerang mendekati kereta Viva, ia berjaya melarikan diri sementara kedua-dua adik-beradik itu ditangkap oleh pihak polis. Dadah yang dirampas itu kemudiannya dihantar kepada ahli kimia yang mengesahkan jenis dadah dan berat seperti yang dinyatakan dalam pertuduhan. Mereka telah disabitkan dan dihukum mati oleh pesuruhjaya kehakiman yang bijaksana. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan dan mengesahkan keputusan pesuruhjaya kehakiman:

(1) Peranan masing-masing yang dimainkan oleh Ramani dan Devendran, adalah bukti yang jelas tentang niat bersama seperti yang dinyatakan dalam pertuduhan yang mana pembelaan penafian kosong mereka gagal mencipta keraguan munasabah. Selain itu, pesuruhjaya kehakiman yang bijaksana berhak sepenuhnya, untuk memberi sedikit keberatan kepada kenyataan dari kandang tertuduh Devendran kerana ia diterima dalam undang-undang bahawa pernyataan sedemikian, yang tidak diberikan di bawah sumpah dan tidak tertakluk kepada pemeriksaan balas membawa berat yang sangat sedikit. Isu percanggahan dalam keterangan PW4 dengan laporan polis yang dibuat oleh PW2 berkenaan dengan masa sebenar apabila isyarat untuk serangan hendap dibuat tidak material sama sekali (lihat perenggan 9).

(2) PW2 telah menjelaskan apa yang dilakukannya dengan ekshibit selepas

rampasan seperti yang dilakukan pegawai penyiasat. Tambahan pula, apabila PW2 memberikan keterangan dia tidak diminta untuk menjelaskan sama ada skala berat yang digunakan olehnya telah ditentukur. Tanpa berhadapan dengan saksi tersebut dengan isu fakta seperti itu, sudah terlambat untuk membuat satu isu dalam rayuan ini (lihat perenggan 10).

(3) Mahkamah tidak dapat bersetuju dengan pendapat bahawa terdapat penindasan keterangan iaitu laporan forensik oleh pemeriksa tiga telefon bimbit yang dirampas daripada kedua-dua saudara. Bukti dari panggilan dari telefon bimbit tersebut tidak material dan tidak menciptakan jurang dalam kes pendakwaan dalam fakta-fakta yang diberikan tentang kes ini yang dibina di atas rundingan sebelum penjualan dan penghantaran yang sebenarnya dibuat pada waktu dan tempat yang ditetapkan. Bukti panggilan telefon, jika ada, hanya semata-mata menyokong dan pembelaan tidak pernah mencabar ketiadaannya apabila pegawai penyiasat memberi keterangan. Maka tidak ada penindasan bukti seperti yang dikatakan (lihat perenggan 11–12).

(4) Ia tidak pernah dipertikaikan oleh pihak pembelaan semasa kes pendakwaan bahawa kereta tersebut bukan kereta Viva seperti yang diterangkan oleh PW2, PW4 dan PW5. Keterangan yang berkaitan dengan kereta tersebut daripada saksi-saksi tersebut memandangkan tidak ada tentangan harus diambil kira sebagai diterima oleh pihak pembelaan berdasarkan kegagalan mereka sendiri untuk menyoal balas saksi-saksi yang berkaitan mengenai penghuraiannya (lihat perenggan 13).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 321–500.

Cases referred to

Ahmad Zaini bin Zainol & Anor v PP and another appeal [2013] 3 MLJ 499; [2013] 4 CLJ 613, CA (refd)
DA Duncan v PP [1980] 2 MLJ 195, FC (refd)
Hasbala Mohd Sarong v PP [2013] 6 MLJ 636; [2013] 6 CLJ 945, FC (refd)
Lew Wai Loon v PP [2014] 3 MLJ 325, FC (refd)
Munusamy v Public Prosecutor [1987] 1 MLJ 492, SC (refd)
PP v Sanassi [1970] 2 MLJ 198 (refd)
Shamsuddin bin Hassan & Anor v PP [1991] 3 MLJ 314, SC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 40A

Appeal from: Criminal Trial No 45A-230–12 of 2013 (High Court, Shah Alam)

T Vijayandran (Grace S Nathan with him) (T Vijay & Co) in Criminal Appeal Nos B-05(M)-157–04 of 2017 and B-05(M)-159–04 of 2017 for the appellants.

Khairul Anur bin Abdul (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rhodzariah Bujang JCA:

[1] Each of the appellants who are brothers in these two appeals, which we heard together, were jointly charged in the Shah Alam High Court with trafficking in 339.3g of heroin and 140.4g of monoacetylmorphines with two others still at large. They were convicted and sentenced to death by the learned judicial commissioner. Their appeals were dismissed by us on 3 January 2019 for reasons which will be laid out in this judgment. For ease of reference the appellants would be referred to in this judgment by their first names, to wit, Ramani and Devendran respectively.

THE CHARGE

[2] It is in Bahasa Malaysia and reads as follows:

> Bahawa kamu bersama-sama dengan dua lagi yang masih bebas pada 20 Jun 2013 lebih kurang 11.2 pagi bertempat di kawasan stesyen Minyak Caltex, Lot 39822, Jalan Semenyih di dalam daerah Kajang, dalam Negeri Selangor Darul Ehsan bagi mencapai niat bersama telah mengedar dadah berbahaya iaitu sejumlah berat 339.3 gram Heroin dan 140.4 gram monoacetylmorphines and oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B92) Akta yang sama dibaca bersama seksyen 34 Kanun Keseksaan.

THE PROSECUTION'S CASE

[3] The events that led to the commission of the offence was precipitated by the information supplied by a registered informer to a police inspector ('PW4') that Ramani was trafficking in heroin in Kajang area and the former then followed up that communication by contacting Ramani in the presence of PW4. PW4 was introduced by the informer to Ramani as Ganapathy from Malacca who was an interested buyer of the drug. Thereafter PW4 contacted Ramani who said he was waiting for PW4's call and they then arranged to meet and did meet at Restoran Anjung in Kajang.

THE PRIOR MEETINGS

[4] There were altogether two meetings prior to the date of the offence. The first was on 28 May 2013. PW4 went to that meeting with a fellow policeman ('PW5') who masqueraded as his worker. At that meeting, where Ramani came alone, discussion was held, after parties have introduced each other, on the price of heroin and this was subsequently agreed. PW4 then told Ramani that he would contact him after getting orders from his own clients for the drug. The second meeting took place also in Kajang but at Kentucky Fried Chicken (KFC) Restaurant on 13 June 2013 although initially it was supposed to be the same place as the first. For this meeting, PW4 was also accompanied by PW5. The police also had a back-up team headed by PW2. Further discussion was held on the amount of drugs to be supplied and a date, 19 June 2013 was fixed for the delivery of 35lbs of heroin. This amount was reduced to 30lbs by Ramani as he said 5lbs had been sold to another client of his. On the said date Ramani called PW4 a few times to first confirm the delivery but which PW4 postponed to the next day on the pretext that he was in Johor Bahru, despite the insistence of Ramani who called him a few more times that day, The third meeting, on 20 June 2013 was the day when the seizure and arrest was made.

THE FINAL DATE

[5] The police, under the command of one ACP Nordin bin Kadir assembled their team and got ready the sum of RM195,000 being the purchase price of 30lbs of heroin. The designated meeting point was Caltex petrol station in Kajang at about 11am. PW4 and PW5 left in a Vios car and upon reaching the station, PW4 informed Ramani of their position and the car he was using was the Vios. 20 minutes after their arrival, Ramani arrived in the same motorcycle which he used to come for their previous meetings, but this time with a pillion rider, later identified as Devendran whom Ramani introduced as his brother when they approached the Vios. Devendran alighted from the motorcycle and asked about the money from PW4 whereupon he was brought by PW4 to the Vios car and PW5 who was in the car showed him the money.

Devendran then informed PW4 that his friend would come with the heroin soon. PW4 said he heard Ramani called someone using his handphone and asked that person to enter the Caltex station. About five minutes after that call, a white Viva car came and stopped in front of the Vios car. According to PW4, Devendran then brought him to the back passenger seat, opened it's door where he saw another two Indian men in the driver's and front passenger's seat. Devendran took a bag (exh P12) from behind the driver's seat and showed him the packets of heroin. At that point, PW4 gave the pre-arranged signal to his other team members by taking off his spectacle and took the bag handed to him by Devendran. However, as the raiding team approached the Viva car, it

managed to dashed off whilst the two brothers were apprehended by the police. The drug seized were subsequently sent to the chemist (PW1) who confirmed the type of drug and of the weight as stated in the charge.

PRIMA FACIE CASE

[6] Based on the aforesaid evidence, the learned judicial commissioner was of the view that a prima facie case has been made out against the two brothers as there was a sale and actual delivery of the drug. There was also common intention because they were both present at the scene and participated in the final delivery of the said drug. The act of selling comes within the definition of s 2 of the Dangerous Drugs Act 1952 ('the DDA'), held His Lordship further.

THE DEFENCE

[7] In gist, Ramani's defence given by way of his sworn testimony, was to deny the purpose of the prior meetings. They were no negotiations pertaining to the sale of the drugs but an attempt was made by PW4 to recruit him as an informer. During the prior meetings, he said a relative of his named Tanesh Kumar was also present. At the Caltex station where they went on account of PW4's persuasion to discuss something important with him, his brother was never asked for or was shown the money by PW4 and that it was PW4 who took out the bag containing the drug from the Viva car and placed it on the road before that Viva car left. Thereafter, he said they were arrested. The statement from the dock of Devendran also supported that of his brother, that it was PW4 who opened the Viva's door and took the drug. He flatly denied showing the drugs to PW4 or being shown the money by him.

[8] The learned judicial commissioner found that the defence was a bare denial of the offence whilst the evidence against them by the prosecution witnesses were overwhelming. There was no reason, His Lordship said for the police to frame up the two brothers just because Ramani refused to be a police informer and equally no reason why PW4 would want to meet Ramani at the Caltex station just for a discussion. Further, PW4 and PW5 as agent provocateurs were worthy of credit without any need for corroboration under s 40A of the DDA.

THE APPEAL

[9] Much was made by learned counsel for the appellants for the failure of the police raiding team (numbering 22 personnels) at the Caltex station to stop and apprehend the occupants of the white Viva car that delivered the drug to the said station. Whilst it is indeed puzzling how PW4, PW5 and the investigation officer (PW7) could not obtain the registration number of that Viva car, nevertheless that failure alone could not impugned the convictions of

these two brothers because of the strong evidence laid out against them which was the negotiations pertaining to the sale with Ramani and the role played by Devendran on the actual delivery of the drug at the Caltex station. This we say even if we do not accept the excuse given by the learned DPP that the focus of the whole raiding team at that material time was the two brothers. To us, the respective roles played by them, are clear evidence of a common intention as laid out in the charge which their defence of bare denial, as laid out in *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195, have failed to create a reasonable doubt. Furthermore, the learned judicial commissioner was fully entitled, not just because the defence was as stated earlier, a bare denial but also in the absence of cogent evidence to hold otherwise, to give little weight to the statement from the dock of the Devendran for it is accepted in law that such a statement, being not given under oath and not subject to cross-examination carries very little weight. It should not even be classified as evidence said Sharma J in *Public Prosecutor v Sanassi* [1970] 2 MLJ 198 and which this court agreed in *Ahmad Zaini bin Zainol & Anor v Public Prosecutor and another appeal* [2013] 3 MLJ 499; [2013] 4 CLJ 613.

The appellant's counsel also raised the issue of the discrepancy in the evidence of PW4 with that in the police report (exh P16) made by PW2 (ACP Husni) in respect of the actual time when the signal to ambush was made. In his evidence PW4 said the signal was given after the bag's content was shown to him but in the report, it was stated by PW2 that it was when Devendran opened the Viva car's door. As the learned DPP rightly raised in answer during the hearing before us, PW2 was not the one who gave the signal — it was PW4 and what is more PW2 was not standing right beside or was in close proximity with PW4 to actually see the exact timing of PW4's action. Therefore, viewed in this light, the contradiction spoken of is not material at all.

THE EXHIBITS

[10] Learned counsel for the two brothers also submitted on the identity of the drug exhibits produced in court for he said there was a difference of 49.4g in the weight of the drugs in the chemist report (exh P9) and the police report (exh P16) which he said was not explained. However the decisions of the Federal Court in *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636; [2013] 6 CLJ 945 and *Lew Wai Loon v Public Prosecutor* [2014] 3 MLJ 325 cited by him in his written submission confirmed that such an unexplained difference in weight does not ipso facto raise a reasonable doubt in the absence of any break in the chain of evidence casting doubts that the exhibits seized, analysed by the chemist and produced in court are the same ones unless there is a break in the chain of evidence. Nonetheless there is such a break in this case, said learned counsel because there was a lapse of five hours between the time the drugs were seized at 1120 hours and their handing over by PW2 to the investigating officer (PW7) at 1615 hours. Such a gap, he submitted based on

the Supreme Court's decision in *Shamsuddin bin Hassan & Anor v Public Prosecutor* [1991] 3 MLJ 314 was enough not to call for the appellants in the said case to enter their defence to the charge. With respect to learned counsel, *Shamsuddin*'s case had been taken out of context because the drugs in that case were not marked before it was handed over to the chemist and the markings were done only six days after the investigation officer received it from the raiding officer. In this case the drug exhibit had been properly marked by the investigation officer and the delay in handing over was merely a few hours. Further, PW2 had explained what he did with the exhibits after the seizure as did the investigation officer who said that after the seizure he marked the 30 packets of drugs as G1–G30 and also affixed his signature thereon. Furthermore, when PW2 gave evidence he was not asked to explain whether the weighing scale used by him was calibrated — if he had been asked this, the matter could have been clarified then. The case of *Hasbala* which was also cited by learned deputy public prosecutor held that the difference in weight could be due to uncalibrated weighing machine and the prosecution must be given opportunity to state so by the defence challenging the evidence when the relevant witness gave evidence — this is purely fairness in an adverserial system of trials in our country. Without confronting the said witness with such factual issue it was simply too late to make that an issue in this appeal.

SUPPRESSION OF EVIDENCE

[11] It is also the submission of learned counsel for the two appellants that there was suppression of the evidence which is the forensics report by the examiner of the three handphones seized from the two brothers. This is crucial, he said because the evidence of PW4 at Vol 2 p 42 of the appeal record where he states that:

> Setelah OKT 2 tengok duit, OKT 2 memberitahu OK dan kemudian saya tanya kepada OKT 2 di mana 30 pound heroin itu, saya hendak tengok. Kemudian OKT 2 beritahu kepada saya. Dia beritahu 30 pound heroin itu tidak boleh bawa dengan motosikal. Kawan OKT 2 akan hantar sekejab lagi. Kemudian saya nampak OKT 1 telah hubungi seseorang melalui talipon dan saya dengar dia memberitahu kepada seseorang untuk masuk ke dalam Caltex Kajang. Selepas lebih kurang 5 minit saya nampak sebuah kereta Viva tiba. Nombor saya tidak beberapa ingat berhenti berhampiran kereta saya.

Therefore, learned counsel submitted at paras 34–36 of his written submission:

> [34] It can be seen from the above testimony of PW4 that the charge of trafficking against them is premised on the narrative that 5 minutes before the drugs were brought to the Caltex station on the 20th June 2013 at 11.20 am, the First Appellant had made a telephone call directing them to enter the Caltex station.
>
> [35] If indeed this telephone call was made by the appellant for the express purpose of directing the drugs to be brought into the Caltex station compound, the forensic

examination of the telephone which was seized could certainly have helped in the arrest of the driver or other person (still at large).

[36] This constitutes a gap in the case. Especially in the circumstances that the defence version is premised upon the narrative that they had nothing do with the drugs that were brought to the Caltex station on the day of the arrest and seizure. In the case of *Md Desa b Hashim v PP* [1995] 3 MLJ 350 the Federal Court said as follows:

> ... if the court is satisfied that, at the stage of the proceeding, there was withheld from the appellant the benefit of a rule operating in his favour, then, it is the duty of this court to intervene and set right any miscarriage of justice that may have resulted in consequence.

[12] We are unable to agree with the above contention. The evidence of the calls from the said handphones are not material and did not create any gap in the prosecution's case in the given facts of this case which was built on the negotiations prior to the sale and the actual delivery made at the appointed time and place. The evidence of the telephone calls, if any, was merely corroborative and the defence never did challenge the non-production of it when the investigation officer gave evidence. There was therefore no suppression of evidence as alleged in line with the ratio in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, but only a failure to produce the same.

CCTV FOOTAGE

[13] Lastly on the issue of the Viva car used to deliver the drugs, learned counsel referred to the photographs taken from the CCTV recorded at the Caltex station which appeared at p 3 of Vol 3 of the appeal record. He said it looks more like a Proton rather than a Viva car. Be that as it may, it was never disputed by the defence during the prosecution case that the car was not a Viva car as described by PW2, PW4 and PW5. The evidence pertaining to the said car from the said witnesses in view of the non-challenge must be taken to have been accepted by the defence based on their own failure to cross-examine the relevant witnesses on its description.

CONCLUSION

[14] For the reasons stated above, the appeal was dismissed and the decision of the learned judicial commissioner affirmed.

Appeal dismissed and decision of judicial commissioner affirmed.

Reported by Ahmad Ismail Illman Mohd Razali